

1 THE HONORABLE MARSHA J. PECHMAN
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 **AMAZON.COM LLC,**)) No. 10-CV-00664
11 Plaintiff,)) **PLAINTIFF'S MOTION**
12 v.)) **FOR SUMMARY JUDGMENT**
13 **KENNETH R. LAY**, in his official capacity as)) **PURSUANT TO**
14 Secretary of the North Carolina Department of)) **FED. R. CIV. P. 56(a)**
Revenue,)) **NOTE ON MOTION CALENDAR:**
15 Defendant.)) August 6, 2010
16 _____)) **ORAL ARGUMENT REQUESTED**
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CONTENTS

2			
3	I.	PRELIMINARY STATEMENT	1
4	II.	FACTUAL BACKGROUND.....	3
5	III.	ARGUMENT.....	7
6	A.	Standard of Review	7
7	B.	The DOR Fails to Meet the Heightened Standard Applicable to Governmental Requests for Information About Individual Purchases of Expressive Material	8
8	1.	Buying and Selling of Expressive Materials Are Protected Activities Under the First Amendment	8
9	2.	The DOR’s Information Requests Implicate the First Amendment	11
10	3.	The DOR Must Satisfy a Heightened Standard by Showing a Compelling Need for the Materials and a Sufficiently Close Connection Between the Materials Sought and the Investigation	13
11	4.	The DOR Has Not Made the Heightened Showing of Compelling Need and Nexus Between the Material and the Investigation to Justify Intrusion into First Amendment Protected Speech.....	17
12	C.	To the Extent That the DOR’s Request Applies to Video Sales, It Violates the Video Privacy Protection Act	20
13	IV.	CONCLUSION.....	23
14			

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>ACLU v. Gonzales</i> , 478 F. Supp. 2d 775 (E.D. Pa. 2007), <i>aff'd</i> , 534 F.3d 181 (3d Cir. 2008).....	12
<i>ACLU v. Heller</i> , 378 F.3d 979 (9th Cir. 2004).....	10
<i>Ashcroft v. ACLU</i> , 542 U.S. 656 (2004).....	12
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	8
<i>Bursey v. United States</i> , 466 F.2d 1059 (9th Cir. 1972), <i>superseded by statute on other grounds</i> , <i>In re Grand Jury Proceedings</i> , 863 F.2d 667 (9th Cir. 1988).....	15, 16
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	7
<i>Dirkes v. Borough of Runnemede</i> , 936 F. Supp. 235 (D.N.J. 1996).....	21, 22
<i>Doe v. 2TheMart.com Inc.</i> , 140 F. Supp. 2d 1088 (W.D. Wash. 2001).....	11
<i>Doe v. Reed</i> , 2010 WL 2518466 (U.S. June 24, 2010).....	9, 10
<i>In re Anonymous Online Speakers</i> , 2010 WL 2721490 (9th Cir. July 12, 2010)	10
<i>In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461</i> , 2009 WL 3495997 (D.D.C. 2009)	14, 18
<i>In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006</i> , 246 F.R.D. 570 (W.D. Wis. 2007)	12, 13, 14, 20
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965).....	8
<i>Keenan v. Allan</i> , 889 F. Supp. 1320 (E.D. Wash. 1995), <i>aff'd</i> , 91 F.3d 1275 (9th Cir. 1996).....	7, 8

1	<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965).....	9
2	<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943).....	8
3		
4	<i>McIntyre v. Ohio Elections Comm'n</i> , 514 U.S. 334 (1995).....	9, 10, 20
5		
6	<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958).....	9
7		
8	<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969).....	8
9		
10	<i>Salehoo Group, Ltd. v. ABC Co.</i> , No. 10-0671 slip op. (W.D. Wash. July 12, 2010)	10, 11
11		
12	<i>United States v. C.E. Hobbs Found.</i> , 7 F.3d 169 (9th Cir. 1993).....	16
13		
14	<i>United States v. Curtin</i> , 489 F.3d 935 (9th Cir. 2007).....	20
15		
16	<i>United States v. Rumely</i> , 345 U.S. 41 (1953).....	1, 9
17		
18	<i>United States v. Stevens</i> , 2010 WL 1540082 (U.S. Apr. 20, 2010).....	13
19		
20	<i>United States v. Trader's State Bank</i> , 695 F.2d 1132 (9th Cir. 1983)	16
21		
22	STATE CASES	
23		
24	<i>In re Grand Jury Subpoena to Kramerbooks & Afterwords</i> , 26 Media L. Rep. 1599 (D.C. 1998)	15, 17, 18
25		
26	<i>JJR Inc. v. City of Seattle</i> , 126 Wash. 2d 1, 891 P.2d 720 (Wash. 1995) (<i>en banc</i>)	9
27		
28	<i>Lubin v. Agora, Inc.</i> , 882 A.2d 833 (Md. 2005).....	16, 17, 18, 19
29		
30	<i>State v. Walker</i> , 2004 WL 52413 (Wash. Ct. App. Jan. 13, 2004)	21
31		
32	<i>Tattered Cover, Inc. v. City of Thornton</i> , 44 P.3d 1044 (Colo. 2002) (<i>en banc</i>).....	14, 15, 17, 19
33		

FEDERAL STATUTES

18 U.S.C. § 2710 3, 20-22

STATE STATUTES

N.C. Gen. Stat. § 105-258 4, 22

CONSTITUTIONAL PROVISIONSFirst Amendment *passim***STATE CONSTITUTIONAL PROVISIONS**Washington State Const. art. I, § 4 *passim*Washington State Const. art. I, § 5 *passim***RULES**

Fed. R. Civ. P. 56(a) 2

Fed R. Civ. P. 56(c) 7

OTHER AUTHORITIESNeil M. Richards, *Intellectual Privacy*, 87 Tex. L. Rev. 387 (2008) 8S. Rep. No. 100-599 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1 21

I. PRELIMINARY STATEMENT

“Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears.” *United States v. Rumely*, 345 U.S. 41, 57-58 (1953) (Douglas, J., concurring). In requests of staggering breadth, the North Carolina Department of Revenue (“DOR”) demanded that Amazon.com LLC (“Amazon”) turn over “all information for all sales” for all North Carolina customers for the past seven years. In response, Amazon provided detailed records for nearly 50 million transactions – the majority of which involved the purchase of books, movies, and music – but refused to disclose the names and addresses of its customers. Furnishing this additional information to a taxing authority, which would reveal the beliefs, interests and intimate personal details of its customers, serves no valid purpose and would violate basic constitutional principles. Through this action, Amazon seeks a declaration establishing its right to sell, and its customers’ right to purchase, the broadest range of lawful expressive material free from government scrutiny.

The voluminous transactional data the DOR has obtained from Amazon to date fully describes every product purchased by a North Carolina customer since 2003, including the title and name of every book, movie, and CD. As to the DOR's purported tax audit of Amazon, the DOR now has all of the transactional data – including the type of products Amazon sold to North Carolina customers, what they paid, and what tax, if any, Amazon collected for each sale – necessary to determine Amazon's compliance with state sales tax laws. Indeed, the DOR has now conceded as much in its Motion to Dismiss; customer data is needed if and when the DOR decides to collect a use tax from Amazon's customers. *See* North Carolina (DOR) Motion to Dismiss ("Motion to Dismiss") at 6.

The breadth of the DOR's demands and its unyielding position that it has the right to enforce similar information demands in the future puts Amazon in the untenable position of

either risking enforcement proceedings for its refusal to comply with the DOR's information requests or revealing to the DOR the reading, viewing and listening choices of unsuspecting customers by disclosing *millions* of purchase records for expressive works such as books, videos, and music. Because Amazon's compliance with such a request would violate its rights and its customers' rights under the United States Constitution, the Washington State Constitution, and federal law, Amazon filed this declaratory judgment action.

In response to Amazon's lawsuit, Kenneth R. Lay, the DOR's Secretary, publicly declared that "information revealing personal consumer preferences, such as book titles . . . is not required to calculate the tax due" and offered to return the millions of such records collected to date. Declaration of Jennifer Galbreath ("Galbreath Decl.") at Ex. D. In its Motion to Dismiss, the DOR states that "this information is of absolutely no value" to the DOR in its collection of tax revenue from Amazon, but cautions that it may still seek to enforce "a summons that includes customer names." Motion to Dismiss at 6, 17. Outside the public eye, the DOR has categorically reserved its right to compel production of the same information about customers and their expressive choices. Declaration of David A. Zapsky ("Zapsky Decl.") ¶ 23 & Ex. 4.

Absent a compelling need for information that the DOR itself now admits it does not need, the DOR cannot satisfy the heightened First Amendment standard courts apply to government demands for reader/viewer lists. Because the DOR cannot justify its sweeping and purposeless intrusion into the privacy of Amazon's customers, pursuant to Fed. R. Civ. P. 56(a), Amazon respectfully seeks a declaration that the DOR's efforts to compel the disclosure of Amazon's North Carolina customers' purchase histories, as well as the names, addresses or other personal information of those customers, violate the First Amendment to the United States Constitution, the Washington State Constitution art. I, §§ 4 and 5, and, for

video media, the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710.

II. FACTUAL BACKGROUND

Amazon’s Customer Privacy Policy. Amazon is one of the world’s leading online retailers of books, music, movies, and other types of products, with millions of customers all over the world. Zapsky Decl. ¶ 3. As with most online retailers, customers make purchases primarily through credit card transactions, which in turn generate detailed electronic records of all purchases. *Id.* To assure its customers that Amazon does not voluntarily share the customers’ expressive and other product choices, Amazon posts a link to its Privacy Notice at the bottom of practically every page on its website. *Id.* at ¶ 7.

DOT's December 2009 Information Request. On December 1, 2009, as part of a purported audit of Amazon for compliance with state sales and use tax laws, the DOT sent Amazon an Information Document Request (the “December Information Request”), demanding, in part, that Amazon provide “all information for all sales to customers with a North Carolina shipping address by month in an electronic format” for all dates between August 1, 2003, and February 28, 2010. Galbreath Decl. ¶ 5 & Ex. A (emphasis added). In this time period, North Carolina customers purchased nearly 50 million products from Amazon’s website. *Id.* at ¶ 3. Acting in good faith, Amazon provided the DOT with detailed information about these purchases, including: order ID number, the product code for each item sold on Amazon’s website called the Amazon Standard Identification Number (or “ASIN”),¹ seller, ship-to city or county, postal code, the non-taxable amount of the purchase, and tax audit record identification (the “Initial Data”). *Id.* at ¶ 7. However, to protect

¹ Amazon uses ASIN numbers to identify products in its catalog and its systems. Sales information for each product is stored by ASIN number as well. As a general matter, Amazon does not maintain sales records for specific items in its systems by more generic product codes. Galbreath Decl. ¶ 8.

1 customer privacy, including customer choices of expressive material, Amazon did not provide
 2 the DOR any personally identifiable information about any customer, including name,
 3 address, phone number, or e-mail address. *Id.* at ¶ 9.

4 **DOOR's March 2010 Information Request.** Despite Amazon's production of all
 5 relevant information necessary for an audit of Amazon, the DOR hand delivered to Amazon a
 6 follow-up request (the "March Information Request," singularly, and together with the
 7 December Information Request, the "Request") demanding Amazon provide the following
 8 customer identification information for each transaction: the "Bill to Name; Bill to Address
 9 (Street, City, State, and Zip); Ship to Name; [and] Ship to Address (Street)" "Product/item
 10 code or description" (the "Customer Data"). Galbreath Decl. ¶ 11 & Ex. B. The March
 11 Information Request reiterated, rather than eliminated, the prior request for product detail.
 12 The DOR threatened that if Amazon did not disclose the Customer Data by April 19, 2010, it
 13 would "prompt the state to issue a summons in accordance with North Carolina General
 14 Statute § 105-258," *id.*, which allows the DOR to enforce the administrative summons in a
 15 summary state court proceeding. *See* N.C. Gen. Stat. § 105-258.

16 On April 19, 2010, Amazon objected to the March Information Request on the
 17 grounds of over-breadth and because it violates Amazon's customers' expectation of privacy,
 18 creates an unreasonable burden on Amazon, and is in violation of the First Amendment,
 19 federal law and Washington constitutional law. Galbreath Decl. ¶ 12 & Ex. C. Amazon
 20 notified the DOR that it would not disclose the Customer Data and filed this action the same
 21 day. *Id.*

22 **DOOR's Response to Amazon's Lawsuit.** In response to Amazon's objection and the
 23 filing of this lawsuit, the DOR took the position that the DOR is not seeking "information
 24 revealing personal consumer preferences" and conceded in a press release that "[t]his

1 information is not required to calculate the tax due.” Galbreath Decl. ¶ 15 & Ex. D. The
 2 DOR offered to return the Initial Data in exchange for the customer information Amazon had
 3 not provided. *Id.* at ¶ 16. In response to these public assurances, Amazon asked the DOR to
 4 (a) confirm that in the event of return the DOR had not created additional copies of the Initial
 5 Data, (b) enter into a consent order prohibiting the DOR from seeking the titles of expressive
 6 material in the future, and (c) explain whether and why the DOR needs the personally
 7 identifiable customer information to audit Amazon. *Id.* at ¶ 17; Zapsolsky Decl. ¶ 19 & Ex. 1.
 8 Amazon also asked the DOR to issue a revised information request that expressly excluded
 9 the names and titles of books, movies, CDs and other expressive materials. *Id.*

10 The DOR declined to provide Amazon with a binding commitment. Instead, in a letter
 11 dated June 7, 2010, the DOR explained that it had issued a new information request “not
 12 focused on customer names” and stated that “at least for the time being,” the DOR is
 13 “deferring action on customer names.” Zapsolsky Decl. ¶ 21 & Ex. 3. Further, the DOR’s
 14 most recent information request, issued on June 4, 2010 (the “June Information Request”),
 15 does not supersede the earlier request for “all information for all sales” and does not mention
 16 the Customer Data the DOR demanded in the March Information Request. Galbreath Decl.
 17 ¶ 5 & Ex. A. Indeed, the June Information Request acknowledges that it “seeks additional
 18 information, as well as information previously requested and not provided, about the business
 19 operations and tax reporting of Amazon.com, Inc. and its subsidiaries.” *Id.* at ¶ 21 & Ex. F
 20 (emphasis added). The same letter further “reserves the right to request additional
 21 information including, but not limited to, information not provided in response to earlier IDR
 22 requests.” *Id.* In response to a direct inquiry by Amazon’s counsel, the DOR, through its
 23 counsel, has expressly declined to enter into any binding commitment not to seek information
 24
 25
 26
 27

1 about customer purchases of books, movies, and CDs in the future. Zapsky Decl. ¶ 23 &
 2 Ex. 4.

3 Although the DOR has never withdrawn its request for “all information for all sales”
 4 and expressly reserved the right to seek information about customers’ purchase of expressive
 5 material, in its recent public filings in this case, the DOR has reiterated that such information
 6 has “absolutely no value” to the DOR and that the DOR “does not . . . require” and “simply
 7 does not need” such information – indeed, the DOR admits that the information is not
 8 “relevant” to its “tax investigation of Amazon and its customers.” Motion to Dismiss at 6, 8;
 9 DOR’s Response to Motion to Intervene of Does 1-6 and Bothwell at 3. The DOR has also
 10 conceded that customer names would be relevant if it decides to assess a use tax against
 11 Amazon’s customers. Motion to Dismiss at 6. The June Information Request is clearly
 12 directed at determining whether Amazon has any obligation to collect sales tax. Galbreath
 13 Decl. ¶¶ 21, 22 & Ex. F. Nonetheless, the DOR expressly reiterates in its new filings its
 14 threat to enforce a summons for customer names and explicitly states that it just “has not
 15 decided” whether to pursue such a course of action. Motion to Dismiss at 17.

16 **DOR’s Actions Chill First Amendment Freedom.** Amazon’s North Carolina
 17 customers purchase works that reflect their beliefs and interests and that discuss highly
 18 personal matters. A few examples of works purchased suffice to show the intimate
 19 information revealed in a customer’s choice of expressive material: “Bipolar Disorder: A
 20 Guide for Patients and Families,” by Francis Mark Mondimore; “He Had It Coming: How to
 21 Outsmart Your Husband and Win Your Divorce,” by Stacy Schneider; “Living With
 22 Alcoholism: Your Guide To Dealing With Alcohol Abuse And Addiction While Getting The
 23 Alcoholism Treatment You Need,” by K M S Publishing.com; “What to Do When You Can’t
 24 Get Pregnant: The Complete Guide to All the Technologies for Couples Facing Fertility

1 Problems,” by Daniel A. Potter and Jennifer S. Hanin; and “Outing Yourself: How to Come
 2 Out as Lesbian or Gay to Your Family, Friends, and Coworkers,” by Michelangelo Signorile.
 3 Zapolsky Decl. ¶ 15. Customers express particular concern about the potential for disclosure
 4 of data about their online purchases and their reluctance to purchase online unless their
 5 privacy is protected. *Id.* at ¶ 24.

6 Most recently, seven Amazon customers (six anonymous) have sought this Court’s
 7 leave to intervene in this case as plaintiffs on grounds that the DOR’s efforts to obtain
 8 personally identifiable data and purchase records from Amazon threaten their privacy and
 9 First Amendment rights. *See* Complaint in Intervention for Declaration and Injunctive Relief
 10 of Does 1-6 and Bothwell. Their declarations submitted in support of the motion for
 11 intervention provide significant detail as to how the DOR threatens to chill the exercise of
 12 First Amendment freedoms and demonstrate that customers purchase titles from Amazon to
 13 preserve anonymity and to avoid being seen by their friends and neighbors in a local store as
 14 they browse for and select reading, viewing and listening material. *Id.*

17 III. ARGUMENT

18 A. Standard of Review

19 Under Fed. R. Civ. P. 56(c), summary judgment is warranted “upon motion, against a
 20 party who fails to make a showing sufficient to establish the existence of an element essential
 21 to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*
 22 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This motion, like dismissal for failure to state a
 23 claim as urged by Defendants (Motion to Dismiss at 20-25), turns on legal issues, not facts,
 24 and thus calls for predisclosure resolution, which is particularly appropriate where First
 25 Amendment interests are implicated. *See, e.g., Keenan v. Allan*, 889 F. Supp. 1320, 1387-88
 26
 27

(E.D. Wash. 1995) (*quoting Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (“In the First Amendment area, summary procedures are even more essential.”)), *aff’d*, 91 F.3d 1275 (9th Cir. 1996).

B. The DOR Fails to Meet the Heightened Standard Applicable to Governmental Requests for Information About Individual Purchases of Expressive Material

1. Buying and Selling of Expressive Materials Are Protected Activities Under the First Amendment

Bookstores, music stores and video stores, whether on Main Street or on the Internet, provide constitutionally protected forums for the exchange of ideas, affording purchasers the opportunity to browse and buy books, movies, music, and other expressive works on any topic imaginable. “[T]he act of selecting reading material is a basic act of expressive liberty, regardless of the subject matter of what we read. [Revelation of] our reading habits . . . not only makes public these private cognitive processes, but also threatens to chill others in the future from engaging in the unfettered act of reading.” Neil M. Richards, *Intellectual Privacy*, 87 Tex. L. Rev. 387, 421 (2008). The First Amendment protects the right to distribute and the right to receive expressive materials. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“[T]he Constitution protects the right to receive information and ideas.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (protections include “the right to distribute, the right to receive, the right to read . . . and freedom of inquiry . . .”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64-65 n.6 (1963) (freedom of the press “embraces the circulation of books as well as their publication”); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (protects “the right to distribute literature” and “the right to receive it”). If anything, the Washington State Constitution provides even broader protection for speech than the First Amendment in cases such as this where the speech is expressive (and not, for

example, commercial or defamatory). *See, e.g., JJR Inc. v. City of Seattle*, 126 Wash. 2d 1, 8, 891 P.2d 720, 723 (Wash. 1995) (*en banc*) (“it is well settled that article 1, section 5 of the Washington State Constitution provides broader free speech protection than the first amendment to the United States Constitution”).

The DOR’s Request for detailed data about Amazon’s customers and their purchases will expose the reading, viewing, and listening habits of individuals who have not broken any law. Many individuals wish to remain anonymous as they browse and purchase expressive material, and the Supreme Court has underscored the value of anonymous expressive activity in a free society:

Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society.

McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995) (striking down a state statute prohibiting distribution of anonymous campaign literature on First Amendment grounds) (internal citations omitted). Indeed, the Supreme Court has observed:

Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. . . . Fear of criticism goes with every person into the bookstall. . . . Some will fear to read what is unpopular, what the powers-that-be dislike. . . . [F]ear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press.

United States v. Rumely, 345 U.S. at 57-58 (Douglas, J., concurring). This concern is at the heart of Amazon’s objections to the DOR’s Request.²

² See also *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (striking down a federal statute requiring citizens wishing to receive communist literature to affirmatively identify themselves to the Post Office because the lack of anonymity would have a “deterrent effect” and would chill First Amendment rights to receive expressive materials); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (state not entitled to scrutinize organizations’ membership lists due to threat of chilling freedom of association). Compare with *Doe v. Reed*,

1 The Courts in this Circuit follow the Supreme Court's approach in *McIntyre* that
 2 “[a]nonymity provides a shield from the tyranny of the majority” for expressive activity
 3 protected by the First Amendment. *See, e.g., ACLU v. Heller*, 378 F.3d 979, 988-90 (9th Cir.
 4 2004) (quoting *McIntyre* in striking down a Nevada statute on First Amendment grounds). In
 5 order to protect online users against disclosure of their identities, this Court and others have
 6 applied First Amendment principles with the same rigor with which they apply such
 7 principles to political speech and traditional media. Just this week, both the Ninth Circuit
 8 Court of Appeals and this Court reaffirmed the “high hurdle for disclosure” of the identity of
 9 anonymous online speakers, the Ninth Circuit observing:

11 As with other forms of expression, the ability to speak anonymously on
 12 the Internet promotes the robust exchange of ideas and allows individuals
 13 to express themselves freely without “fear of economic or official
 14 retaliation . . . [or] concern about social ostracism.”

15 *In re Anonymous Online Speakers*, 2010 WL 2721490 at *6 (9th Cir. July 12, 2010) (quoting
 16 *McIntyre*, 514 U.S. at 342-43) (with regard to speech about commercial activities, finding no
 17 clear error in compelling disclosure of the identity of three online speakers and prohibiting
 18 disclosure of two others). In *Salehoo Group, Ltd. v. ABC Co.*, No. 10-0671 slip op. (W.D.
 19 Wash. July 12, 2010), Judge Robart quashed a subpoena for the identity of an anonymous
 20 website owner and operator, cautioning:

21 Subpoenas seeking the identity of anonymous individuals raise First
 22 Amendment concerns. With the expansion of online expression, the use
 23 of subpoenas to unmask anonymous Internet speakers . . . is on the rise.
 24 The use of subpoenas in the context of the Internet raises serious concerns
 25 because it threatens to cause “a significant chilling effect on Internet
 26 communications and thus on basic First Amendment rights.”

27

 28 2010 WL 2518466 (U.S. June 24, 2010) (referendum signatures gathered in public as part of public electoral
 29 process, while protected by the First Amendment, subject to disclosure generally, but an as-applied challenge
 30 upon showing of reasonable probability of harm not foreclosed).

1 *Id.* at 5 (internal citations omitted) (reviewing cases from other jurisdictions); *see also Doe v.*
 2 *TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092, 1093 (W.D. Wash. 2001) (quashing a
 3 subpoena seeking identifying information about an anonymous online poster: [p]eople who
 4 have committed no wrongdoing should be free to participate in online forums without fear
 5 that their identity will be exposed under the authority of the court) (internal citations
 6 omitted).

7

8 **2. The DOR's Information Requests Implicate the First Amendment**

9 The protection that this Court, the Ninth Circuit, and the Supreme Court have afforded
 10 to anonymous speech – both on the Internet and in other contexts – applies fully to the DOR's
 11 demand that Amazon disclose the names, addresses and purchase habits about its North
 12 Carolina customers. Many of Amazon's North Carolina customers' online purchases of
 13 expressive materials could be considered sensitive, personal, controversial or unpopular.
 14 Each order of a book, movie, or CD potentially reveals an intimate fact about an Amazon
 15 customer, and for that reason, many of Amazon's customers wish to remain anonymous.
 16 Disclosure of the titles themselves poses no threat, but connecting the titles of such works to
 17 specific individuals will chill the exercise of First Amendment rights. Public figures who
 18 have purchased expressive works and other items from Amazon have the additional concern
 19 that their purchase histories will be scrutinized and used for political purposes, appear in the
 20 press, or otherwise be made public.

21

22 Because of the tremendous amount of personal data that can be collected and stored on
 23 electronic computer records, particularly where the State seeks records of literally millions of
 24 purchases, the “specter” of Big Brother looms large with regard to online purchases of
 25 expressive works. In contrast to a brick and mortar store, when a customer purchases a work
 26

1 from Amazon, he or she *must* typically use a credit card, and the transaction information –
 2 which necessarily includes the title of the work that is being shipped to the customer – is
 3 electronically stored. Zapsky Decl. ¶ 5. As evidenced by the many privacy inquiries that
 4 Amazon receives each year, *id.* at ¶ 7, customers have a heightened awareness that an
 5 electronic record of their expressive choices is created when they shop online. “Web users
 6 are especially unlikely to provide a credit card or personal information to gain access to
 7 sensitive, personal, controversial, or stigmatized content on the web. As a result of this desire
 8 to remain anonymous, many users who are not willing to access information non-
 9 anonymously will be deterred from accessing the desired information.” *ACLU v. Gonzales*,
 10 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007), *aff’d*, 534 F.3d 181 (3d Cir. 2008); *see also id.* at
 11 812 (forcing users who seek access to online content to reveal their identities online “will chill
 12 speech”). The Supreme Court has expressed concern about Internet users “having to identify
 13 themselves or provide their credit card information” before being able to access online
 14 content. *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004).

16 The unique experience of online shopping for expressive materials from the
 17 privacy of one’s own home has had a positive effect on the customer’s ability to
 18 exercise his or her First Amendment rights to browse and purchase – and Amazon’s
 19 right to distribute – expressive materials in an unfettered manner. Accordingly,
 20 Amazon has acted vigorously to protect its and its customers’ First Amendment and
 21 privacy rights. For example, when served in 2007 with a grand jury subpoena in
 22 connection with a federal tax prosecution in Wisconsin, Amazon disclosed – as here
 23 – the titles of books, CDs, and DVDs but refused to disclose the customers’ names.
 24 *In re Grand Jury Subpoena to Amazon.com dated August 7, 2006*, 246 F.R.D. 570
 25 (W.D. Wis. 2007) (refusing to compel disclosure). The court recognized that

1 Amazon “has a legitimate concern that honoring the instant subpoena would chill
 2 online purchases by Amazon customers,” cautioning against what the court called
 3 the “un-American scenario”:

4 The subpoena is troubling because it permits the government to peek into
 5 the reading habits of specific individuals without their prior knowledge or
 6 permission. . . . [I]t is an unsettling and un-American scenario to envision
 7 federal agents nosing through the reading lists of law-abiding citizens. . . .
 8 Taken a step further, if word were to spread over the Net – and it would –
 9 that the FBI and the IRS had demanded and received Amazon’s list of
 10 customers and their personal purchases, the chilling effect on expressive e-
 11 commerce would frost keyboards across America. . . . [W]ell-founded or
 12 rumors of an Orwellian federal criminal investigation into the reading
 13 habits of Amazon’s customers could frighten countless potential
 14 customers into canceling planned online book purchases, now and perhaps
 forever.

15 *Id.* at 572-73. Such protected activities must be safeguarded from invasive government
 16 demands like the DOR’s outstanding Requests, as well as against similar demands that the
 17 DOR may make in the future.

18 **3. The DOR Must Satisfy a Heightened Standard by Showing a
 19 Compelling Need for the Materials and a Sufficiently Close
 20 Connection Between the Materials Sought and the Investigation**

21 “The First Amendment itself reflects a judgment by the American people that the
 22 benefits of its restrictions on the Government outweigh the costs.” *United States v. Stevens*,
 23 2010 WL 1540082, at *1 (U.S. Apr. 20, 2010) (striking down federal law that made criminal
 24 the sale of videos depicting dog fighting). Accordingly, in cases such as this where the
 25 government’s demand for private information collides with First Amendment rights, the
 26 government must make a heightened showing of need, demonstrating both a compelling
 27 interest in the requested information and a sufficient nexus between that information and the
 underlying inquiry or investigation.

This heightened standard was most recently applied to a government request for online purchase data in *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 2009 WL 3495997 (D.D.C. 2009). In investigating a company's distribution of adult-oriented movies, the government sought "a copy of records that show the identity of all movies sold or distributed, including the date of each transaction, payment received, and method and date of each [] shipment, from customer purchases from the website/domain name." *Id.* at *1. The company withheld information identifying its customers, and on the government's motion to compel, the court ruled that because "records of customer purchases of expressive materials . . . are presumptively protected by the First Amendment," the government was required to "demonstrate[] a compelling need . . . and a sufficient nexus between the records and the . . . investigation," or that the records were not entitled to First Amendment protection. *Id.* at *5.

Similarly, in considering Amazon's motion to quash the federal grand jury subpoena in the tax prosecution, the Wisconsin court held that the "First Amendment concern is a factor for the court to consider when determining whether to require compliance with the subpoena," obligating the government to make a heightened showing of need for the information about customers who had purchased specific books, CDs, and DVDs. The subpoena was ultimately withdrawn after the court refused to compel involuntary disclosure of customer names. *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. at 573.

Other courts have applied this heightened standard to booksellers' customer lists and have consistently held that a third-party seller of expressive works should not be forced to reveal the reading lists of unsuspecting buyers in response to a government demand. As the Colorado Supreme Court explained in *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002) (*en banc*), "the First Amendment embraces the individual's right to purchase and

1 read whatever books she wishes to, without fear that the government will take steps to
 2 discover which books she buys, reads, or intends to read.” *Id.* at 1053. The Court first held
 3 that the government must make a heightened showing of a “compelling need *for the precise*
 4 *and specific information sought*” from a seller of expressive content, and must then consider
 5 “whether there are reasonable alternative means of satisfying the asserted need and whether
 6 the search warrant is overly broad.” *Id.* at 1058. Even if there is a “compelling need,” the
 7 court must “then balance the law enforcement officials’ need for the bookstore record against
 8 the harm caused to constitutional interests by the execution of the search warrant.” *Id.* The
 9 Court held that the government’s need for the book purchase records was not sufficiently
 10 compelling to outweigh the harm caused to readers’ First Amendment rights and that the
 11 search warrant was “not enforceable and should not have issued.” *Id.* at 1047.

13 The mere fact that the government has undertaken an investigation does not excuse
 14 compliance with the applicable heightened standard. For example, in *In re Grand Jury*
 15 *Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Media L. Rep. 1599 (D.C. 1998), the
 16 Independent Counsel sought to investigate Monica Lewinsky’s reading choices to corroborate
 17 allegations of a sexual affair with the President of the United States. Finding that disclosure
 18 of a patron’s choice of books would have a chilling effect on First Amendment rights, the
 19 district court applied a heightened standard to a grand jury subpoena directed to the bookstore
 20 and required the government to show a “compelling need for the materials” sought and “a
 21 substantial connection between the information sought and the grand jury’s investigation.”
 22 *Id.* at 1601; *see also, e.g., Bursey v. United States*, 466 F.2d 1059, 1081-83 (9th Cir. 1972),
 23 *superseded by statute on other grounds, In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir.
 24 1988) (applying heightened standard to grand jury subpoena seeking to identify subscribers to
 25 Black Panther publications and requiring that a “substantial connection” exist between the
 26
 27

1 information sought and an “overriding government interest” and that the subpoena be “no
 2 more drastic than necessary” (internal citation omitted); *Lubin v. Agora, Inc.*, 882 A.2d 833,
 3 846 (Md. 2005) (in quashing subpoena, the state’s highest court imposed a heightened
 4 standard on a subpoena for subscriber lists of an investment newsletter publisher suspected of
 5 securities violations, requiring the government to “establish a substantial relation between the
 6 information sought and an overriding and compelling State interest”).

7 These heightened standards have applied to tax inquiries whenever a government
 8 demand for information conflicts with First Amendment rights, as the Ninth Circuit cases
 9 cited by the DOR confirm. *See Motion to Dismiss* at 21-22, *citing United States v. C.E.*
 10 *Hobbs Found.*, 7 F.3d 169, 173 (9th Cir. 1993) (where a summons in a tax inquiry “burdens
 11 the exercise of [First Amendment rights],” the tax authority’s action “will be upheld ‘only
 12 upon demonstration that a compelling governmental interest warrants the burden, and that less
 13 restrictive means to achieve the government’s ends are not available’” (internal citation
 14 omitted)); *United States v. Trader’s State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983)
 15 (quashing Internal Revenue Service summons because the IRS failed to show a “rational
 16 connection between” disclosure and a legitimate government end and failed to demonstrate a
 17 “compelling governmental interest in the disclosure”).

18 Here, as in these precedents, the DOR’s Request (and similar future requests the DOR
 19 claims the right to make) collide with the First Amendment rights of Amazon to sell, and its
 20 customers to purchase, expressive works. Consequently, to properly pursue its Request, the
 21 DOR must demonstrate both a compelling interest in the Customer Data and a sufficient
 22 nexus between the DOR’s demand for the Customer Data and its audit of Amazon.
 23
 24
 25
 26
 27

4. The DOR Has Not Made the Heightened Showing of Compelling Need and Nexus Between the Material and the Investigation to Justify Intrusion into First Amendment Protected Speech

Since this litigation commenced, the DOR has publicly conceded it does not need the detailed names and titles of expressive works purchased from Amazon to conduct a tax audit of Amazon and “is, at least for the time being, deferring action on customer names” while it pursues other information (although it refuses to back down from its claim of power to demand exactly the same detailed information at any time in the future). Zapsolsky Decl. ¶ 21 & Ex. 3. The DOR demonstrably fails to satisfy what even it concedes is the heightened standard applicable to the Request because it fails to show (1) “a compelling interest in the information sought or a compelling need for the information sought,” or (2) “a sufficient connection between the information sought and the [government] investigation.”

Kramerbooks, 26 Media L. Rep. at 1601; *see also Lubin*, 882 A.2d at 846; *Tattered Cover*, 44 P.3d at 1058. It is not enough for the DOR to assert that the “government’s interest in maintaining a workable tax system” is “compelling.” Motion to Dismiss at 6. The DOR does not say – and cannot say – that its need for this information is compelling; in fact, the DOR says the opposite – that this information has “absolutely no value” to its inquiry into Amazon’s tax compliance. *Id.* at 6, 21.

The sheer numbers involved in this case underscore the vital need for application of this heightened standard. The DOR sought and obtained the titles of literally millions of expressive materials and has demanded the names and other personal information of the hundreds of thousands of citizens who chose to purchase and/or order those materials. The DOR claims an ongoing right to demand the same information in the future, without limitation. In contrast, in *Tattered Cover* and *Kramerbooks*, the courts insisted that the government satisfy a heightened standard with regard to single individuals; here, the potential

1 First Amendment intrusion is multiplied hundreds of thousands of times over by the breadth
 2 of the Request.

3 There is no compelling interest in forcing Amazon to identify specific customers who
 4 purchased specific books, music, and DVDs, because Amazon has given the government all
 5 financial and transactional information relevant to the DOR's assessment of Amazon's tax
 6 liability. If the DOR wishes to know how much money Amazon received from North
 7 Carolina customers, or whether the products purchased were taxable, or what products an
 8 anonymous individual in fact purchased, the DOR need look no further than the information
 9 already produced. Galbreath Decl. ¶ 13; *see also In re Grand Jury Investigation of Possible*
 10 *Violation of 18 U.S.C. § 1461*, 2009 WL 3495997, at *7 (“What the names of the customers
 11 who made these purchases have to do with establishing this presumption [of the number of
 12 sales] is unclear to this Court, and since the records produced by Company X already go
 13 towards establishing the presumption, the United States' proffered reason is not
 14 compelling.”).

15 In addition to failing to show a compelling need for the information sought by the
 16 Request, the DOR cannot satisfy the second element of the heightened showing because a
 17 “sufficient connection” does not exist between the information sought and the tax liability
 18 investigation. *Kramerbooks*, 26 Media L. Rep. at 1601. This requirement prevents the DOR
 19 from undertaking a “fishing expedition,” *Lubin*, 882 A.2d at 847, that compromises First
 20 Amendment rights. Unfortunately, a fishing expedition is exactly what the DOR appears to
 21 be pursuing here. The Request presents no chance of yielding additional information relevant
 22 to the DOR's tax audit of Amazon, and scrutinizing Amazon's customers' purchases of
 23 expressive works will not “make or break” or even materially advance the DOR's
 24 investigation.

1 But even assuming, *arguendo*, that Amazon's disclosure of the Customer Data was the
 2 only way to assess Amazon's tax compliance, "the speculative value of the purchaser
 3 information does not outweigh the burden that compelled disclosure would place on the First
 4 Amendment interests of the individuals identified." *Lubin*, 882 A.2d at 847 (quashing
 5 subpoena while acknowledging that the government might "ferret out additional instances of
 6 securities fraud by contacting essentially every subscriber"); *see also Tattered Cover*, 44 P.3d
 7 at 1063 (the government failed to meet heightened standard for a search warrant directed at
 8 booksellers' customer purchase records, even though such records provide "a piece of the
 9 evidentiary puzzle."). Even if the DOR's Request did give the DOR additional information of
 10 some relevance to Amazon's tax compliance, the burden on Amazon and its North Carolina
 11 customers far outweighs the DOR's interest in the Customer Data.

13 Because customers' identities and specific expressive purchases are not relevant to the
 14 DOR's tax audit of Amazon, Amazon can divine only one possible motive for the DOR's
 15 interest in customers' names and addresses – to contact the buyers. Certain individuals will
 16 surely be distressed if government agents, as part of a tax liability investigation, have access
 17 to or ask them about their purchase of a book on alcoholism, a controversial political DVD, or
 18 a CD by a provocative recording artist.

20 Regardless of what the DOR actually does with the Customer Data, customers will be
 21 left to wonder whether the DOR is storing lists of the expressive works they purchased for an
 22 unspecified and potentially infinite period of time. They may also wonder who exactly had
 23 access to those records either within the DOR or other government offices and whether
 24 sufficient security measures have been installed. And despite the DOR's public statements
 25 (made after Amazon sued) attempting to assure the public that it does not need this
 26 information, the DOR refuses to give Amazon any similar assurance in an enforceable form,

1 and instead asserts the ongoing right to require Amazon to produce all of the same
 2 information at any time.

3 Worse, Amazon customers may come to expect such questioning in the future and
 4 hesitate before purchasing, reading, viewing and listening to certain materials out of
 5 embarrassment or fear; indeed, “the chilling effect on expressive e-commerce would frost
 6 keyboards across America.” *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. at 573.
 7 Customers’ desires for anonymity “may be motivated by fear of economic or official
 8 retaliation, by concern about social ostracism, or merely by a desire to preserve as much of
 9 one’s privacy as possible.” *McIntyre*, 514 U.S. at 341-42. Whatever the reason, the DOR’s
 10 audit of Amazon will not benefit from the disclosure of the Customer Data, while the First
 11 Amendment rights of customers (and Amazon itself) will suffer a grave violation if Amazon
 12 is forced to comply with the Request.

13 Because the DOR has failed to demonstrate a compelling need or any nexus between
 14 the Customer Data and its tax audit of Amazon – much less a nexus that would justify such a
 15 broad intrusion into activities protected by the First Amendment and the Washington State
 16 Constitution – Amazon simply cannot constitutionally be compelled to comply with the
 17 Request.

18

19 **C. To the Extent That the DOR’s Request Applies to Video Sales, It Violates
 20 the Video Privacy Protection Act**

21

22 Because the Request seeks the names and other identifying information of individuals
 23 who purchased DVDs, Blu-Ray discs, VHS tapes and other audiovisual materials, it directly
 24 conflicts with the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (“VPPA”); *see*
 25 *also United States v. Curtin*, 489 F.3d 935, 959 n.1 (9th Cir. 2007) (concurring opinion)
 26 (“Congress has made actionable ‘wrongful disclosure of video tape rental or sales records’”)

1 (quoting VPPA); *State v. Walker*, 2004 WL 52413, at *2-3 (Wash. Ct. App. Jan. 13, 2004);

2 *Dirkes v. Borough of Runnemede*, 936 F. Supp. 235, 240 n.7 (D.N.J. 1996).

3 In a criminal proceeding, “[a] video tape service provider may disclose personally
 4 identifiable information concerning any consumer” “to a law enforcement agency pursuant to
 5 a warrant, . . . a grand jury subpoena, or a court order,” but only upon a showing that “there is
 6 probable cause to believe that the records . . . sought are relevant to a legitimate law
 7 enforcement inquiry” and “with prior notice to the consumer.” 18 U.S.C. § 2710(b)(2)(C),
 8 (3); *see also* S. Rep. No. 100-599, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1,
 9 4342-10. Similarly, disclosure in a civil proceeding must be pursuant to a court order and
 10 only upon “a showing of compelling need for the information that cannot be accommodated
 11 by any other means.” 18 U.S.C. § 2710(b)(2)(F). The consumer must be afforded
 12 “reasonable notice, by the person seeking the disclosure, of the court proceeding” and “the
 13 opportunity to appear to contest the claim of the person seeking the disclosure.” 18 U.S.C.
 14 § 2710(b)(2)(F)(i)-(ii).

15 Amazon qualifies as a “video tape service provider” under § 2710 because Amazon is
 16 a “person, engaged in the business, in or affecting interstate or foreign commerce, of rental,
 17 sale, or delivery of prerecorded video cassette tapes *or similar audio visual materials.*” 18
 18 U.S.C. § 2710(a)(4) (emphasis added). The personally identifiable information at issue
 19 concerns “consumers” within the meaning of the statute. 18 U.S.C. § 2710(a)(4) (definition
 20 of consumer includes purchasers of video or similar audio visual materials). Both DVDs and
 21 Blu-Ray discs sold by Amazon are “similar audiovisual materials” within the meaning of the
 22 statute, because they are simply modern incarnations of “prerecorded video tapes.” *See* S.
 23 Rep. No. 100-599, at 12, 14, 1988 U.S.C.C.A.N. at 4342-10, 4342-12.
 24
 25
 26
 27

1 Although the proceedings under N.C. Gen. Stat. § 105-258 are a hybrid between a
 2 civil action and a law enforcement proceeding, an order compelling Amazon's response to the
 3 Request would not satisfy VPPA's requirements for a civil or a criminal proceeding. If the
 4 proceeding is criminal in nature, in order to meet the requirements of section 2710, the DOR
 5 must demonstrate "probable cause" to believe that information identifying Amazon's
 6 audiovisual purchasers is relevant to the tax liability assessment investigation. 18 U.S.C.
 7 § 2710(b)(3). If civil, the DOR must make "a showing of compelling need for the
 8 information" about Amazon's audiovisual purchasers "that cannot be accommodated by any
 9 other means." 18 U.S.C. § 2710(b)(2). For the reasons stated above and because disclosure
 10 of identifying information will add nothing of consequence to the DOR's investigation, the
 11 DOR cannot even come close to making either showing.

13 In addition to making the requisite showing of probable cause or compelling need, the
 14 DOR must give prior and reasonable "notice to the consumer," that is, to each of the
 15 individuals who purchased DVDs, Blu-Ray discs, and VHS tapes in the millions of
 16 transactions at issue. 18 U.S.C. § 2710(b)(3). In a civil proceeding, each affected Amazon
 17 customer must be "afforded the opportunity to appear and contest" the DOR's request for the
 18 information. *Id.* Amazon does not believe that the DOR has notified even a single customer
 19 of its planned invasion of privacy and violation of First Amendment rights.

21 To the extent that the Request involves audiovisual sales, Amazon's compliance
 22 would thus be in direct violation of federal law. To disregard these requirements would
 23 violate "the clear intent of the Act," which is to "enable[] consumers 'to maintain control over
 24 personal information.'" *Dirkes*, 936 F. Supp. at 240 (quoting S. Rep. No. 100-599, at 8).

IV. CONCLUSION

For the foregoing reasons, Amazon is entitled to summary judgment. Amazon respectfully requests this Court to declare that, as part of an audit of Amazon's tax compliance, the DOR may not require Amazon to disclose the names, addresses, and purchasing habits of its North Carolina customers. A proposed form of order shall be provided to the Court and to Defendant.

Respectfully submitted this 15th day of July, 2010.

DAVIS WRIGHT TREMAINE LLP

s/ Steven P. Caplow
Steven P. Caplow, WSBA #19843
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Tel: (206) 622-3150
Fax: (206) 757-7700
Email: stevencaplow@dwt.com

Laura R. Handman (*pro hac vice*)
Robert G. Scott, Jr. (*pro hac vice*)
Elizabeth J. Soja (*pro hac vice*)
1919 Pennsylvania Avenue, NW, Suite 800
Washington, D.C. 20006
Tel: (202) 973-4225
Fax: (202) 973-4499
Email: laurahandman@dwt.com
bobscott@dwt.com
elizabethsoja@dwt.com

Attorneys for Amazon.com LLC